IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al., Plaintiffs, vs. Tyson Foods, Inc., et al., Defendants.	)	**Case No. 4:05-CV-00329-GKF-PJC**

DEFENDANTS' REPLY IN SUPPORT OF THEIR JOINT MOTION TO EXCLUDE TESTIMONY OF STRATUS CONSULTING EXPERTS UNDER F.R.E. 702 (DKT. 2272)

Plaintiffs' response (Dkt. 2320) fails to rebut the inherent weaknesses in their damages opinions. The question before this Court is not whether contingent valuation ("CV") is in the abstract a reliable methodology, but whether the Stratus experts' CV survey performed here is fit and reliable enough to survive Daubert. Plaintiffs cannot, and do not, dispute that respondents were asked what they would hypothetically pay for an entirely fictional restoration program, nor can they rebut the fact that their results were skewed by hypothetical bias. Based on these flaws alone, the damages studies performed by Plaintiffs' experts fail under Rule 702 and Daubert.

ARGUMENT

A. Applicable Regulations Place Appropriate Limits on the Use of CV.

Congress, through the President, directed the U.S. Department of Interior ("DOI") to promulgate regulations governing natural resource damages assessments ("NRDAs") by trustees like the State of Oklahoma. 42 U.S.C. § 9651(c). Plaintiffs here have repeatedly (incorrectly) claimed that Stratus conducted its CV survey per the DOI's NRDA regulations. (Dkt. 2270 at 1; Dkt. 1853-4: Stratus R. at 1-4.) The fact that the Stratus survey failed to follow the applicable NRDA regulations in material respects evidences its unreliability.

The DOI's regulatory framework mandates a detailed assessment process. Ex. A: 43 C.F.R. § 11.60 (1994).[1] One of those regulations states:

> The use of contingent valuation methodology to explicitly estimate option and existence values should only be used if the official determines that no use values can be determined.

Ex. B: 43 C.F.R. § 11.83(c)(2)(vii)(B) (1994). Plaintiffs "assume" that a typo in Defendants'

[1] The 1994 regulations were in force when Plaintiffs began their CV survey and apply here. (See Dkt. 2272 at 6 n.2.) The 1994 regulations were revised in 2008 beyond mere "technical" edits. (Cf. Dkt. 2320 at 9 n.10.) DOI replaced the limitation on the use of CV in 43 C.F.R. § 11.83(c)(2)(vii)(B) (1994) with substantive guidelines on CV use and an emphasis on restoration versus monetary damages. See 43 C.F.R. §§ 11.83-.84 (2008); Fed. Reg. 57,261 (Oct. 2, 2008).

Opening Brief[2] refers to a completely different regulation that they say was "invalidated twenty years ago in Ohio." (Dkt. 2320 at 9.) But Plaintiffs should know that Defendants were referring to a regulation applicable to Plaintiffs in 2007. (See Bishop email at Dkt. #2272-3: discussing regulation at issue.) And the regulation, which clearly applies to Plaintiffs, was ignored.

Plaintiffs' reliance on Ohio v. U.S. DOI is misplaced. (See Dkt. 2320 at 3-4.) In 1989, the D.C. Circuit reviewed a *facial* challenge to the then new DOI regulations. The court was not considering the admissibility of an actual CV survey, but rather applied a Chevron analysis to the regulations. Ohio v. U.S. DOI, 880 F.2d 432, 441 (D.C. Cir. 1989). Among other findings, the court held that regulations barring the computation of nonuse values to situations when the Trustee determined that use values could not be determined contravened CERCLA. Id. at 438, 464. But as DOI noted in the 1994 amendments that were partly a response to Ohio:

> [T]he court did not require the Department to allow unlimited use of CV. Moreover, the court did not address the difference between use of CV to calculate lost use values and use of CV to calculate lost nonuse values.

Ex. C: 59 Fed. Reg. 14,265 (Mar. 25, 1994) (emphasis added).

In revising the regulations, DOI retained the language of 43 C.F.R. § 11.83(c)(2)(vii)(B) as a check on the use of CV because "[n]onuse values, unlike use values, are … more difficult to validate externally than use values." 59 Fed. Reg. 14,265. That regulatory language does not completely exclude the estimation of lost nonuse values, but limits the use of contingent valuation. See Ohio, 880 F.2d at 464 ("DOI is entitled to rank methodologies according to its view of their reliability, but it cannot base its complete exclusion of option and existence values on an incorrect reading of the statute."); see also 43 C.F.R. § 11.83(c)(2)(vii)(B) (1994).

The regulations also require Trustees like Plaintiffs to develop a restoration and compensation determination plan, which, as a key component of the assessment process, must be

[2] In the Opening Brief, the "d" in 43 C.F.R. § 11.83(c)(2)(vii)(d), should have been "B."

subject to public comment. Ex. D: 43 C.F.R. § 11.81 (1994). However, Plaintiffs do not have a restoration plan, nor have they taken any public comment. The regulations provide that the plan:

> shall be of sufficient detail to evaluate the possible alternatives for the purpose of selecting the appropriate alternatives to use in determining the cost of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources ….

Id. at § 11.81(a)(2). Because Plaintiffs do not have any restoration plan, there is no factual basis for their selection of fictional alum restoration scenario or the hypothetical clean-up timeframes.

Thus, the hypotheticals tested by Stratus and that form the basis of Stratus' expert opinions are irrelevant and unreliable as the measure of damages in this case. The Court should exclude them. See, e.g., In re Williams Sec. Litig. -WCG Subclass, 558 F.3d 1130, 1137 (10th Cir. 2009) (admitted expert testimony should be relevant and reliable); see also Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 676-77 (1st Cir. 1980) (dismissing NRD award based on hypothetical restoration plan as not "a component in a practicable plan for actual restoration").

B. Plaintiffs' Reliance on the NOAA Guidelines Is Misplaced.

Although the validity of the Stratus survey is not controlled by the guidelines published by the National Oceanic and Atmospheric Administration ("NOAA") Panel, 15 C.F.R. § 990.11 (2007); 73 Fed. Reg. 11,082 (Feb. 29, 2008); see also NOAA Panel at 1: Dkt. 2278-6, Plaintiffs spend much of their briefing discussing them. (See Dkt. 2320 at 16-19.) Even if the NOAA guidelines were instructive, they contain the same predicate as the DOI regulations – that the responsible official will conduct an assessment program, including the creation of a real restoration plan. The Stratus survey fails to meet this threshold predicate.

Moreover, even if the NOAA guidelines applied, Stratus fails to meet the NOAA's Panel's "heavy burden of proof." (See NOAA Panel at 37: Dkt. 2320-7.) Stratus did not satisfy 16 of the 24 identified guidelines, including the guideline regarding non-response rate. (Desvousges R. at 81-84: Dkt. 2272-8.) The low response rate here is especially concerning

since Stratus estimated damages based on responses from only **0.1%** of the 1.35 million household target area. (Stratus R. at 5-16, 7-7: Dkt. 1853-4.) These failures evidence the inherent unreliability of Stratus' expert opinions. See Mitchell v. Gencorp Inc., 165 F.3d 778, 782 (10th Cir. 1999) ("Under Daubert, '*an*y step that renders the analysis unreliable … renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.'") (quotation omitted, emphasis added).

C. No Reported Case has Allowed a CV Study as a Measure of Damages.

Defendants have not "misled" the Court about the absence of any reported case admitting in evidence a CV study to measure natural resource damages. (See Dkt. 2320 at 7.) Courts are very skeptical of CV methodology. Plaintiffs agree that in Idaho v. S. Refrigerated Transp., Inc., and United States v. Montrose Chem. Corp.,[3] the court rejected CV studies. (Dkt. 2320 at 8-9.) Similarly, the Kelley court stated that the proposed measure of damages "appears to be too speculative to provide a measure of damages acceptable in a court of law … based on the nature of the CVM method itself[.]" Kelley v. Kysor Indus. Corp., 1994 U.S. Dist. LEXIS 21194, at *64 n.17 (W.D. Mich. Oct. 27, 1994). In fact, the law review article that Plaintiffs cite in an attempt to distinguish Kelley notes that in the two instances where a court ruled on the validity of CV (Idaho and Montrose), the studies were *rejected*. (See Dkt. 2320 at 8 n.8.)

Plaintiffs' citation to the unpublished Montana v. ARCO, case (id. at 7) actually benefits Defendants. Unlike the State of Oklahoma here, in ARCO, the plaintiff State of Montana appears to have followed the DOI regulations. Montana compiled a substantial record including assessment documents (with public comments and the state's responses), reports prepared by

[3] The Montrose briefs show the CV study did not speak "clearly and directly" to the issues of the case and should be excluded. (Ex. E: Reply at 6); see also Dale B. Thompson, Valuing the Environment: Courts' Struggles with Natural Resource Damages, 32 ENVTL. L. 57, 60 (Winter 2002) (CVs are largely unable to meet courts' requirements of "certainty and concreteness").

both parties' experts, a restoration plan, and EPA materials regarding appropriate clean-up alternatives. (Ex. F: Montana v. ARCO, Mem. & Order at 3.) Plaintiffs here have made no such attempts to comply with these key NRDA regulation provisions.

D. Plaintiffs Admit that Estimated Willingness to Pay Is Dependent on Hypothetical Restoration Timeframes Within the Fictional Alum "Solution.

Plaintiffs do not rebut Defendants' contention that the fictional restoration timeframes render the Stratus damages estimate unreliable and irrelevant. (See generally Dkt. 2320.)

Plaintiffs admit that the alum restoration program is fictional, claiming that it is standard practice for "CV surveys to introduce counterfactual information[.]"[4] (Id. at 12.) Plaintiffs also admit that the restoration timeframes are made up. (Id. at 6; see also Dkt. 2270 at 1-2.) And the Stratus experts admit that the timeframes matter – that they do impact a respondent's willingness to pay. (E.g., Dkt. 2272-14: Krosnick Dep. at 153:22 – 155:2.) Finally, Plaintiffs' expert Todd King recognized the many negative environmental impacts of alum treatment – impacts that were not disclosed to respondents. (Dkt. 1976-16 at 12, 16, 19.)

As a result of these admissions, it is clear that Stratus: (1) falsely told respondents that the State intended to use an alum treatment program whereas in reality the State had evidence it would not work, and (2) misled respondents by using admittedly fictional cleanup timeframes. Further, Stratus admits that if they had told respondents that the restoration timeframe was different, that fact would have resulted in a different damage estimate. Such an illusory program cannot be reliable or relevant. See GE v. Joiner, 522 U.S. 136, 146 (1997) ("[N]othing in either

[4] Whether, as Plaintiffs suggest, it is standard practice in *non-litigation* CV surveys to present false information to survey respondents is irrelevant to the question at hand – whether Plaintiffs' damage estimate, based on a fictional restoration plan and made-up restoration timeframe, is admissible under Daubert. Plaintiffs' reliance on several of Dr. Desvousges' studies to support the claim that so-called "counterfactuals" are commonplace in CV is misplaced. (See Dkt. 2320 at 12 n.12.) Among other differences, none of the studies involve restoration timeframes and none were introduced as evidence in a court of law. (Ex. I: July 21, 2009 Desvousges Decl.)

Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.")

E. Plaintiffs' Injury Scenario Is Inaccurate and Exaggerates Experts' Conclusions.

The Stratus experts also presented an inaccurate injury description to the respondents, a description that contradicted Stratus' own intercept and telephone surveys. Similar inaccuracies and inconsistencies led to the exclusion of the CV survey in Montrose, a survey that was also conducted by Stratus experts Drs. Hanemann and Krosnick and which Dr. Hanemann admits is similar to the one in this case.[5] (Hanemann Dep. at 23:11 – 24:14: Dkt. 2272-7.)

Plaintiffs urge the Court to discount the importance of the intercept and telephone surveys. (See Dkt. 2320 at 13-14.) However, these results – elicited from individuals who actually use the IRW (rather than those whose only familiarity was through Stratus' attempt to "educate" respondents) – form the best available information about real perceptions of the IRW.

Defendants correctly claim that "'the results of the Stratus intercept and telephone surveys demonstrated that most users thought the water quality was good'." (Id. at 13.) These Stratus intercept and telephone results speak for themselves. When actual users were asked what they liked and disliked about the IRW, only 3% mentioned poor water quality of the Lake (none mentioned clarity) and only 1.2% mentioned poor water quality of the River, most of whom were actually referring to debris in the water, not water quality. (Dkt. 2272-8: Desvousges R. at 7-8; Dkt. 2278-13: Intercept Survey at 9.) Similarly, telephone respondents repeatedly mentioned positive impressions, such as:

[5] Plaintiffs attempt to minimize Montrose by recharacterizing Defendants' reference to it. (See Dkt. 2320 at 8.) Defendants cite Montrose for the point that a CV study may not pass Daubert when the study does not align with the facts of the case. (See Defs.' Mot. at 5: Dkt. 2272.)

- "spring-fed clear"
- "clear water"
- "It's beautiful and the water is clear"
- "I love it very clear it's my favorite river"
- "it has clear water – clearer than the others"
- "… you can see your feet in the water, it is really clear and you can see fish"
- "nice to dive in – SCUBA diving in the clear water"
- "just the beauty of the water"
- "clarity of the water"
- "It's pretty and blue, not dirty"

(Dkt. 2272-8: Desvousges R. at 9-12.) Even Plaintiffs' experts admit that the respondents had positive impressions of water quality and clarity. (E.g., Dkt. 2272-6: Morey Dep. at 34:12-35:6.)

Plaintiffs also incorrectly allege that the telephone and intercept surveys were non-representative. (See Dkt. 2320 at 13.) Dr. Tourangeau testified that the intercept study was taken of a representative sample. (Dep. at 17:9-18 ("I … ma[d]e sure … a representative sample of users during that period was intercontacted and interviewed"): Dkt. 2272-15.) Plaintiffs' contention that they adequately addressed peer review concerns about the injury description is also wrong. Plaintiffs have not shown how the injury description changed in response to those serious peer review concerns.[6]

All of these flaws are further indicia of the unreliability of the Stratus experts' opinions and the lack of fit between the facts as represented in the survey and the facts as they existed in reality. See, e.g., Mitchell, 165 F.3d at 781.

F. Plaintiffs Downplay Evidence of Hypothetical Bias Inherent in CV.

Plaintiffs' denial that hypothetical bias in CV is well documented flies in the face of peer-reviewed literature. (See Dkt. 2320 at 10.) Irrespective of whether Dr. Johnston found hypothetical bias in his own CV study (see id.), his conclusion is supported by numerous peer-reviewed surveys comparing the relationship between hypothetical responses and actual

[6] Concerns included: "Some respondents may be currently given the impression that the waters have been destroyed and this is causing the higher than expected proportions of 'yes' responses to the valuation question" and "Do you really want to say smallmouth bass have lived in the river for centuries? Is there data to support these assertions?" (Dkt. 2320 at 14; Dkt. 2272-2 at 1, 3.)

behavior. For example:

- Drs. Murphy and Stevens state that as of October 2004, two meta-analyses of hypothetical bias literature found evidence that hypothetical WTP exceeded actual payments by a magnitude of 10 or more. (Dkt. 2272-12 at 183.)
- Drs. List and Gallet published a meta-analysis on hypothetical bias, analyzing 174 observations from 29 studies to likewise conclude that "more research is necessary." They found that "hypothetical bias appears to exist in contingent valuation exercises across a broad spectrum of goods," and the meta-analysis revealed average exaggerations of up to 10.3 and an average exaggeration of 3. (Ex. G at 243-46.)
- Plaintiffs' own expert Dr. Bishop performed a study comparing actual and hypothetical behavior. Some respondents were asked a hypothetical donation question about removing a road at the Grand Canyon and some were asked for actual contributions. The results speak for themselves – the estimated mean WTP in the hypothetical scenario was $46 to $89 and the mean actual contribution was $9. (Dkt. 2272-12 at 185.)

Plaintiffs want the Court to believe that these studies are all irrelevant. Plaintiffs attempt to distinguish the Stratus survey on the grounds that it used a referendum approach – an approach investigated by Dr. Johnston. (See Dkt. 2320 at 11.) Dr. Johnston, while finding no evidence of hypothetical bias in his referendum CV study, concluded that he did not understand why bias was absent and determined that "additional research is required." (Dkt. 2272-13 at 479.)

The well-documented phenomenon of hypothetical bias, the uncertainty in the scientific literature regarding methods to address hypothetical bias, and Plaintiffs' failure to provide any evidence that hypothetical bias does not exist in their survey all work to render the Stratus survey unreliable under Daubert. Daubert v. Merrell Dow Pharms., 509 U.S. 579, 590 (1993) ("Proposed testimony must be supported by appropriate validation – i.e., 'good grounds[.]'").

G. Plaintiffs' Contingent Valuation Survey Has No Known Error Rate.

Despite Plaintiffs' objections, the Stratus survey does not have a known error rate. See id. at 593-94 (when evaluating reliability, a court should consider the known or potential rate of error as well as standards controlling the technique's operation). As shown above, hypothetical estimates from CV studies can be **ten times** or more greater than actual payments. Nor can

Plaintiffs externally validate their estimate since true willingness to pay can never be known[7] and they did not validate their estimate with actual use data. Although Plaintiffs take issue with Defendants' analysis of demand and income elasticity, they must admit that their results do not comport with standard economic principles. (See Dkt. 2320 at 23.) As the bid increases, "yes" votes should decrease. But the percentage voting yes actually increased as the bid went from $80 to $125. (Dkt. 2272-8: Desvousges R. at 100.) The absence of an error rate is further proof of the unreliability of the Stratus experts' work. See Daubert, 509 U.S. at 593-94.

H. The Damages Estimate Is Highly Dependent on Processing Methods.

Despite Plaintiffs' assertions to the contrary (Dkt. 2320 at 19-20), Stratus' damages estimate is sensitive to manipulation of the survey responses. If it were straightforward, the estimate would not have required seven economists and sophisticated computer programs.

First, as the results did not conform to standard economic principles, the damages estimate changes depending on the estimator used to develop an average willingness to pay. (Dkt. 2272-8: Desvousges R. at 91-92.) Second, the average WTP estimate changes depending on which "yes" votes are included. (Id. at 103-05.) Stratus did not reject any "yes" votes. (E.g., Dkt. 2278-3: Chapman Dep. at 191:3 – 192:1.) But Drs. Desvousges and Rausser recorded a 78.5% reduction in average willingness to pay by recording improper "yes" votes. (Dkt. 2272-8: Desvousges R. at 104.) It is far from arbitrary to recode respondents who were drunk, watching football, or whose answers are inconsistent with logic – especially when developing a damages estimate for litigation. Yet, Stratus included all of these individuals in their damages calculation. Again, this demonstrates the unreliability and irrelevance of the Stratus experts' work. See Daubert, 509 U.S. at 590-91 (expert testimony must be reliable and relevant).

[7] Plaintiffs' claim that the NOAA panel did not require external validation is irrelevant. That panel was comprised of economists, not judges concerned with the admissibility of evidence.

I. Plaintiffs' Past Damages Report Fails Daubert Standards.

In defending the Stratus experts' report on past damages, Plaintiffs attempt to impress the Court by describing a detailed analysis. (See Dkt. 2320 at 23-24.) However, the record reveals that the analysis is actually simplistic and haphazard, and fails under Daubert. For instance, the Stratus experts arbitrarily changed the starting year from 1986 to 1981 just five days before their report was due, resulting in more than a $30 million increase in damages. (Bishop Dep. at 188:25–191:4, 192:17–193:5: Dkt. 2272-5; Hanemann Dep. at 167:1–168:3: Dkt. 2272-7.)

Plaintiffs discuss how Stratus evaluated income levels and attitudes toward the environment over the 1981-2008 timeframe to project their damages over 27 years into the past. But the most reliable way to determine if damages were constant over that 27-year period is to examine environmental quality data (i.e., data supporting the assumption that environmental conditions did not change during this timeframe). Here, there was no data on environmental quality to justify their projection of damages into the past. This is in stark contrast to the EPA study cited in Plaintiffs' brief. (Compare Defs.' Resp. at Dkt. 2321 at 24.) In addition, peer-reviewed literature concludes that the benefits transfer methodology is unsuitable for litigation, and Plaintiffs' experts' own review of the literature supports this finding. (Ex. H: Bishop Dep. Ex. 23.)[8] For all these reasons, the past damages study is unreliable, does not fit this litigation, and will not assist the trier of fact. The Court should exclude it.

CONCLUSION

For all these reasons, the Court should exclude the Stratus experts' unfit opinions.

[8] E.g.: "says that MA-BT studies probably aren't appropriate for litigation purposes" (referring to Bergstrom and Taylor 2006); "if benefits transfer is used as a basis for determining just compensation in the context of [NRD] litigation, the costs of a wrong decision to individuals and society could be quite high" (quoting Bergstrom and DeCivita 2005); "study argues that the time element of BT can cause large uncertainty … author states that [BT] should be applied to uses of environmental valuation where the demand for accuracy is not too high" (re: Navrud 2001).

Respectfully submitted,

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I certify that on the 21st day of July, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and a true and correct copy of the foregoing was sent via separate email to the following:

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